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GOING GLOBAL
Employment contracts

Employing someone to work overseas or who will be travelling extensively in their role brings with it a number of unique challenges. In this briefing, Part Two of our *Going Global Guide*, we focus on preparing employment contracts for employees who will work internationally, and dealing with contractual disputes that may arise.

What should the contract include?

As with any employee, the key commercial terms should be included in the employment contract. This will include rates of pay, holiday entitlement and other benefits. When there is an international element it is also important to set out the position on currency, any travel expenses and work location. Under UK law, employers must specifically state in the contract if an employee is expected to work overseas for more than one month in the year. Data protection law varies across jurisdictions so the contract should be drafted to enable you to process personal data and other information as necessary and comply with any other obligations you have. Employers should also give careful consideration to protecting their business by including appropriate confidentiality provisions, intellectual property protections and restrictive covenants. The next part of our Going Global Guide will focus specifically on restrictive covenants in international employment contracts.

What country's law should you choose?

When drafting an international employment contract, certain clauses that may otherwise be thought of as 'boilerplate' suddenly become more complex. Perhaps the most significant are the choice of law provisions. While the parties have some freedom to choose the law that will apply to the contractual terms, certain statutory employment protections may continue to protect the employee by virtue of them working in, or their employment having a connection with, a particular country. The UK statutory protections were discussed in Part One of our Going Global Guide.

Laws of the UK

Within the UK, employers may already take some time deciding whether to use the law of England

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& Wales, or Scotland. While this different choice of law can occasionally lead to different outcomes in respect of contractual disputes, employment law is generally very closely aligned across the UK and as such, the appropriate choice of law will often be that of the country where the employee usually works.

International contracts

In contracts with an international element, selecting the governing law becomes more important. We have a few tips on where to start when deciding which law to use:

- Firstly, it can simplify matters to align the law of the contract to the statutory regime most likely to apply. Any dispute is then likely to be less costly to manage. It can be difficult to determine in advance which statutory regime(s) will apply and advice should be taken. However, as a rule of thumb, the place the employee will primarily work is often a good starting point.
- Secondly, it is important to consider what statutory regime you would *like* to apply. By choosing the law of a particular country, you can increase the likelihood of the statutory regime of that country being deemed to apply by strengthening the overall connection of the employment relationship with that country. You have also actively agreed to the contract being interpreted in accordance with the laws of that country. It is important to be aware that this could result in certain provisions being incorporated into the contract. For example, the implied term of trust and confidence and the pay equality clause are likely to be read into the contract if parties opt for the contract to be governed by Scots law or the law of England & Wales. As such, it is important to think about these implications when selecting a choice of law.
- Finally, you should ensure that both parties are comfortable with the choice of law. This may involve considering factors such as knowledge of the law of that country and the pros and cons of applying it. Employers may wish to use standard contracts across their organisation, and as such, feel more comfortable opting for the same law as they do on the majority of their other contracts whenever appropriate.

While the contractual choice of law is important, it only forms part of the picture. Employment law is designed to ensure that employees are protected and as such, any choice of law provision cannot normally be used to derogate from or dilute any *statutory* employment rights that the employee would otherwise have.

Jurisdiction issues: where can a claim be brought?

The jurisdiction clause is separate to the choice of law clause. When choosing jurisdiction, you are deciding which country's courts and tribunals should deal with any disputes which arise in respect of the contract. While this will often match the choice of law clause, it does not need to. In most commercial contracts, parties are free to decide on the jurisdiction they would like to select, regardless of the substantive law of the contract. As with the choice of law issues discussed above, the question of which court has jurisdiction to hear disputes about the employment contract, is separate from the issue of which court may have jurisdiction over statutory employment claims, which were discussed in the first part of our Going Global Guide.

European jurisdiction rules

Special jurisdiction rules apply to employment contracts in order to protect employees. In general, if the employee is domiciled in the EU, then the Recast Brussels

Regulations can apply to determine which EU member state has jurisdiction to hear claims relating to the contract, in many cases even overriding any explicit jurisdiction clause in the employment contract. The employment relationship is widely defined and can, for example, include rights under share incentive schemes in addition to traditional employment relationships. As such, it is always very important to take legal advice when dealing with a dispute to determine what the correct jurisdiction is as it is not possible to assume that the jurisdiction clause in the contract can be relied upon.

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The appropriate jurisdiction as governed by the Recast Brussels Regulations depends on the specific circumstances. In cases where there are only two parties to the dispute, the rules are as follows:

- If the **employer** is raising the claim, they must raise it in the EU member state where the employee is domiciled. The only exception to this rule is when the employee has already raised a claim and the employer wishes to raise a counter claim, in which case the employer can raise the counter claim in the same jurisdiction as the initial claim. It does not matter what the contract says in respect of jurisdiction when the employer is raising a claim or counterclaim.
- If the **employee** is raising the claim, they can choose the jurisdiction from the following:
  - If the employer is domiciled in the EU, the member state where the employer is domiciled. The domicile of the employer can be its registered office, but can include other locations such as its central administration or principal place of business.
  - The member state where (or from where, for example a base office or depot) the employee habitually works if any, or the last place in which he did so.
  - If the employee does not (or did not) habitually carry out his work in one country, the member state in which the business which engaged the employee is situated.
  - The courts specified in any jurisdiction clause contained within the contract (whether that is an exclusive or non-exclusive jurisdiction clause).

You can see that in cases where the Recast Brussels Regulations apply, the only party who can ever rely on a contractual jurisdiction clause is the employee. If the Recast Brussels Regulations do not apply, for example, where an employer wishes to sue an employee who is not domiciled in a member state, then they may have to do so in line with the contract of employment, or any other international rules on jurisdiction that could apply to the relationship.

It is understandable to wonder whether it is worthwhile including a jurisdiction clause at all in circumstances where the Recast Brussels Regulations apply. Certainly, its presence can be misleading. Parties may assume that the jurisdiction clause is valid and take action to raise proceedings in that location, only to find that they are not entitled to do so. However, there will be situations where legally it is unclear where a dispute should be raised. Including a jurisdiction clause can often provide a starting point and access to a potential forum. As an employer, you may wish to include a jurisdiction clause to encourage the employee to raise proceedings in a convenient forum for your business. If there is an international element, you should take legal advice on the correct jurisdiction for disputes and be aware that the contract may not contain the complete answer.

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Enforcing judgments

Once you have a judgment from a court or tribunal, you may then face a further challenge of enforcing that judgment where it really matters, being where the losing party's funds are located. There are a number of international conventions which can assist parties trying to enforce judgments across borders. This can be challenging enough when you are trying to recover money from the other party, however, enforcing restrictive covenants to protect a global business can be even trickier. We will consider this issue in the next part of our Going Global Guide.

This briefing is Part Two of our six-part *Going Global Guide* to international employment issues**.** The complete guide includes:

- Part One: Territorial scope of UK employment law
- Part Two: Employment contracts
- Part Three: Restrictive covenants
- Part Four: Employment checklist
- Part Five: Secondments
- Part Six: International employees working in the UK

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